

1 William D. Hyslop
2 United States Attorney
DEREK TAYLOR
3 Assistant United States Attorney
Post Office Box 1494
Spokane, WA 99210-1494
4 Telephone: (509) 353-2767

5
6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 SOUTH HILL MARKET, a Washington
entity; GEDION TEKLEMARIAM
8 TESFA, an individual and OGBAI
GEBREMICHAEL TESFU, an
individual,

9
10 No. 2:19-cv-00073-SMJ

11 DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO STRIKE
REPLY/LEAVE TO FILE SURREPLY

12 Plaintiffs,
vs.

13 UNITED STATES; and U.S.
DEPARTMENT OF AGRICULTURE
(USDA),

14 Defendants.

15 I. **RESPONSE**

16 A. **Defendants' Reply does not raise new arguments.**

17 Defendants were forced to file two declarations in reply in support of their motion
18 for summary judgment to address factual mischaracterizations raised in Plaintiffs'
19 response. Defendants filed the additional declarations in attempts to provide the Court
20 with more than just conclusory points made in reply. Neither the reply nor declarations
21 raise new arguments. Plaintiffs' Motion to Strike/Motion to file a Surreply (ECF No.
22 37) claims new arguments were raised but fails to articulate what the new arguments
23 might be. A simple look at the pleadings filed to date shows no new arguments were
24 raised.

25 1. **Declaration of Elizabeth Rivas**

26 Defendants filed the declaration of Elizabeth Rivas (ECF No. 34) solely to
27 address Plaintiffs' repeated attempts to attribute pictures (ECF 28-4) to FNS. *See* ECF
28 DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STRIKE/FILE
SURREPLY- 1

1 No. 28, p. 6; *see also* ECF No. 31, ¶ 6, 19. The pictures were submitted by Plaintiffs
 2 during the underlying administrative process, and Ms. Rivas was simply trying to clarify
 3 that point. The argument is not new because the exact same point can be found at ECF
 4 No. 15 at AR 790 – 793, where FNS specifically addresses the pictures in question, and
 5 indicates they are undated photographs submitted by Plaintiffs’
 6 representative/accountant Vicki Parker.

7 In addition, Plaintiffs argue that Ms. Rivas cannot contest where the pictures
 8 came from because she was not the FNS contractor doing the site visit and therefore,
 9 the statement is hearsay. *See* ECF No. 37. “Parties may ... submit affidavits in support
 10 of summary judgment, despite the fact that affidavits are often inadmissible at trial as
 11 hearsay, on the theory that the evidence may ultimately be presented at trial in an
 12 admissible form.” *United States v. California Stem Cell Treatment Center, Inc.*, 2020
 13 WL 1289543 (C.D. Cal. 2020) (citing *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*,
 14 452 F.3d 1193, 1199 (10th Cir. 2006)); *see also* Fed. R. Civ. Pro. 56(c)(4) (“An affidavit
 15 or declaration used to support or oppose a motion must be made on personal knowledge,
 16 set out facts that would be admissible in evidence, and show that the affiant or declarant
 17 is competent to testify on the matters stated.”). Ms. Rivas’ declaration outlines her
 18 personal knowledge, does not contain hearsay, and is proper on summary judgment.

19 As Ms. Rivas points out in her declaration, Plaintiffs’ argument misses the boat.
 20 Defendants submitted a declaration to help explain the pictures because Plaintiffs chose
 21 to file pictures (ECF 28-4) without any type of supporting declaration or affidavit, or
 22 any attempt to authenticate the pictures and where they came from. Plaintiffs simply
 23 allege the pictures were taken by FNS (ECF No. 31, ¶ 19),¹ but nothing supports this
 24 position other than conclusory allegations. The authenticated record indicates
 25 otherwise. The pictures were submitted to Ms. Rivas by South Hill’s appointed
 26

27 ¹ Plaintiffs’ responsive documents cite “ECF No. 13-1 at AR 687 – 690” (*see e.g.* ECF No. 31, ¶ 19); however, AR 687-
 28 690 is found under ECF No. 15.

1 representative on May 25, 2018. ECF No. 34; ECF No. 15 at AR 790 – 793.² They were
 2 not taken by the FNS contractor. *Id.* The Administrative Record in this case makes it
 3 obvious these pictures were submitted by Plaintiffs. All of the documents submitted by
 4 Plaintiffs in response to the FNS charge letter can be found at AR 103 – AR 780. ECF
 5 No. 13-1 – ECF No. 15. The pictures cited by Plaintiff are at ECF No. 15 at AR 687 –
 6 690, right in the middle of all the other documents they submitted. Ms. Rivas’
 7 declaration clarifies this point and should not be stricken from the record. There is
 8 nothing new about the argument and it is responsive to an unsupported factual statement
 9 made in Plaintiffs’ response.

10 **2. Deposition excerpts attached to the Supplemental Declaration of**
Derek Taylor

11 Plaintiff also takes issue with the additional deposition excerpts filed in reply.
 12 Once again, the additional excerpts were necessitated by facts outlined in Plaintiffs’
 13 responsive documents which failed to provide context, or in some instances, were
 14 contradictory to deposition testimony. *See* ECF No. 33, p. 6. For example, Plaintiffs’
 15 response submitted a bunch of new receipts showing what customers purchased from
 16 South Hill Market around June - August 2018. ECF No. 28-6. The receipts are not
 17 authenticated, nor attached to any kind of declaration or affidavit. More importantly,
 18 however, the existence of the receipts are contrary to previous testimony.

19 The fact that plaintiff Gedion Tesfa testified under oath at his deposition that
 20 South Hill Market produced all the invoices in its possession and *it does not keep*
receipts or records of what customers purchased is not a new argument. The
 21 Declaration of Derek Taylor (ECF No. 27-1) filed on May 22, 2020 includes an excerpt
 22 from Mr. Tesfa’s deposition where he testifies:
 23

25 **Q.** So, you don’t have – you have records of what you have bought from
 26 vendors, but you don’t have records of what you’ve sold to customers; is
that correct?

27 ² Any other pictures of South Hill from the 2015 timeframe were not part of the EBT record for the November 2017 –
 28 November 2018 review period. ECF No. 34.

1 **A. Yes, that is.**

2 ECF No. 27-1, Tesfa Dep., p. 27:1-8. The additional excerpts filed in the Supplemental
3 Declaration of Derek Taylor (ECF No. 35) show that Mr. Tesfa simply reaffirms the
4 testimony already in the record. Mr. Tesfa repeatedly testified South Hill could not
5 provide records of what customers purchased, yet plaintiffs filed numerous such
6 documents in response to Defendants Motion for Summary Judgment. Highlighting that
7 inconsistency in reply is not improper, nor was it improper to add more portions of his
8 deposition transcripts that simply confirms an already raised argument.

9 Similarly, Defendants submitted another portion of Mr. Tesfa's deposition
10 transcript where he testifies that he cannot explain why multiple transactions occurred
11 in quick succession. ECF No. 35, Tesfa Dep., pp. 29:24-25 – 30:1-6. These excerpts
12 were submitted because Mr. Tesfa filed a declaration in response to the motion for
13 summary judgment where he now provides multiple explanations, albeit without any
14 factual support. ECF No. 30. The additional excerpts show that Mr. Tesfa should not be
15 able to create an issue of fact based on inconsistent statements that are conclusory.

16 **B. No Prejudice to Plaintiffs**

17 Plaintiffs cannot show the additional declarations are prejudicial, mainly because
18 the points raised are not new. The declarations address issues related to (1) pictures of
19 teff flour, and (2) South Hill Market invoices and receipts. These arguments have been
20 at the center of this case since it was in the administrative review process. Plaintiffs
21 attempt to strike documents or submit a surreply is really an attempt to get the last word,
22 which is not how the process works. Plaintiffs' motion should be denied.

23 **C. Even if Declarations are not considered, the record still supports**
24 **summary judgment.**

25 As indicated above, the record already establishes the contents of the Declaration
26 of Elizabeth Rivas and the Supplemental Declaration of Derek Taylor. For example, the
27 Administrative Record shows the pictures in ECF 28-4 were undated photographs

1 submitted by South Hill itself. ECF No. 15 at AR 790 – 793. This is nothing new and
2 the declaration merely confirms that point.

3 The same can be said about Mr. Tesfa's deposition excerpts. A portion of the
4 record already showed he testified South Hill Market does not keep records of what it
5 sold to customers. ECF No. 27-1, Tesfa Dep., p. 27:1-8. The additional excerpts confirm
6 that point, as well as show additional inconsistencies. So even if the declarations filed
7 in reply are not considered, the record still supports Defendants Motion for Summary
8 Judgment.

9 **D. Defendants request Oral Argument if Plaintiffs' Motion is granted.**

10 Defendants respectfully request Oral Argument on the Motion for Summary
11 Judgment if the Court is inclined to grant Plaintiffs' motion to strike/leave to file
12 surreply. Defendants want the record to be clear, and oral argument would allow the
13 Court to ask questions about factual inconsistencies contained in Plaintiffs' response
14 and/or surreply. It would also allow Defendants the opportunity to address any potential
15 issues raised by a surreply. Defendants are willing to work with Plaintiffs counsel and
16 the Court's calendar to find an appropriate time for oral argument.

17 **II. CONCLUSION**

18 Defendants reply materials do not raise new arguments. The declarations respond
19 specifically to factual inconsistencies or new documents submitted in Plaintiffs'
20 response. A surreply is not needed nor warranted, and it is simply designed to give
21 Plaintiff the last word. Defendants respectfully request the Court deny Plaintiffs' motion
22 to strike/file a surreply. If the Court is inclined to grant the motion, Defendants
23 respectfully request oral argument on their Motion for Summary Judgment.

24 \\

25 \\

26 \\

27

28 DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STRIKE/FILE
SURREPLY- 5

1
2 RESPECTFULLY SUBMITTED: July 6, 2020.
3
4

5 William D. Hyslop
6 United States Attorney
7
8

9
10 s/Derek T. Taylor
11 DEREK T. TAYLOR
12 Assistant United States Attorney
13 Attorneys for Defendant United States
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STRIKE/FILE
SURREPLY- 6

1
CERTIFICATE OF SERVICE

2 I hereby certify that on July 6, 2020, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system, which will send notification of such
4 filing to the following:
5

6 Seth Rosenberg
7 Jimmy Garg

seth@seattlelitigation.net
jimmy@seattlelitigation.net

8 And to the following non CM/ECF participants: N/A
9

10
11 *s/Derek T. Taylor*
12 Assistant United States Attorney
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STRIKE/FILE
SURREPLY- 7